Statement of

Trey Pebley
Vice President
McAllen Construction, Inc.
McAllen, Texas

on behalf of

The Associated General Contractors of America

presented to the

Committee on Small Business
U.S. House of Representatives

on the topic of

Meeting the Needs of Small Businesses and Family Farmers in Regulating our Nation's Waters

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The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 33,000 firms, including 7,500 of America's leading general contractors, and over 12,500 specialty-contracting firms. More than 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. Visit the AGC Web site at www.agc.org.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
2300 Wilson Boulevard, Suite 400 ● Arlington, VA 22201 ● Phone: (703) 548-3118 ● FAX: (703) 837-5407

Thank you, Chairwoman Velazquez, Ranking Member Graves, and members of the Committee for the opportunity on behalf of the Associated General Contractors of America (AGC) to participate at today's hearing entitled "Meeting the Needs of Small Businesses and Family Farmers in Regulating our Nation's Waters."

My name is Trey Pebley. I am Vice President of McAllen Construction located in McAllen, Texas. McAllen Construction is a small family owned and operated business that installs municipal utilities such as waterlines, sanitary sewers, and storm sewers for the Texas Department of Transportation, counties, and municipalities. We are also engaged in concrete bridge construction. McAllen Construction currently employs 133 employees and has annual revenues of around $18-20 million. My primary role at the company is to oversee our environmental, health and safety activities, our concrete plant operations, risk management, and the financial side of the business.

I am also an elected Trustee of the McAllen Public Utilities Board. This is an at-large position that oversees the water and wastewater infrastructure and management for the citizens of McAllen, Texas. As an elected official, working on behalf of my town, water quality is an extremely important issue to me. Not just as a builder, but also as a public steward, I am challenged to make decisions about how to best protect water quality and the health and welfare of the citizens of McAllen. Resources are limited, so the projects we are able to fund must be done in a timely and cost-effective manner.

That is why I am concerned about legislative efforts to fundamentally expand the scope of federal Clean Water Act (CWA) jurisdiction. As a contractor, many of our projects require a federal CWA permit. We have seen projects delayed in Texas while we waited on the Corps district—for lack of staff—to issue a permit. These delays have cost us money we did not recoup. Another AGC member in Texas had a $34 million project shut down for 4 years over a wetland that was approximately 80 feet by 200 feet in size. In that example, Texas DOT did issue a materials escalation change order in the amount of $7 million (of taxpayer money) to cover the contractor's increased costs.

I am pleased to testify on behalf of the Associated General Contractors of America (AGC). AGC is the oldest and largest of the national trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson. AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are nearly 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. I am currently an active member of AGC of Texas and AGC of America, and currently serve in a leadership role on AGC of America's Environmental Network Steering Committee.

I. Introduction

The Associated General Contractors of America (AGC) is pleased to submit these comments on the issue of protecting small business in regulating the nation's waters. Specifically, AGC would like to offer its comments on the "Clean Water Restoration Act" (CWRA), which was introduced in the U.S. House of Representatives as H.R. 2421 in the 110th Congress, and in the U.S. Senate as S. 787 in the 111th Congress. AGC strongly opposes the CWRA which would delete the term "navigable waters" from the Clean Water Act (CWA) and subject all "waters of the United States," including all "intrastate waters," and all activities affecting such waters, to federal jurisdiction. AGC encourages the

Administration to undertake and Congress to oversee a common sense rulemaking that would establish readily identifiable limits to federal jurisdiction over waters and wetlands.

Without clear definitions to guide field staff in the regulatory agencies, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions will continue to cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical public infrastructure and private projects.

To clarify the scope of CWA jurisdiction, in light of *SWANCC* and *Rapanos,* this Administration should move forward with a rulemaking, and Congress should encourage (and not pre-empt) this effort. The commonalities between Justice Scalia's plurality opinion and Justice Kennedy's concurrence in *Rapanos* not only provide a starting point to fashion a rational policy; they also provide the Administration with an opportunity to implement balanced, effective regulations in an area that has generated endless litigation for decades. The Administration has taken a necessary first step towards a rulemaking through the issuance of joint guidance to aid regulatory agencies in making jurisdictional determinations. However, AGC believes that the guidance on its own is insufficient to provide clarity to this issue.

II. Statement of Interest

AGC members engage in the construction of commercial buildings and public works facilities, and they prepare the sites and install the utilities necessary for residential and commercial development. Many of their construction projects lie in "waters of the United States," within the meaning of the CWA, and therefore require federal permits. Whether any one project lies in such "waters" depends on the precise contours of that term.

Today, the contours are far from certain, and the uncertainty has become a great burden for AGC members to bear. The federal permits required for construction activity in "waters of the United States" are both costly and time-consuming to obtain. While their environmental purposes are laudable, they do add to the cost and delay of the completion of the private and public infrastructure that literally forms the foundation of our nation's economy.

At the same time, the penalties for failing to obtain a necessary permit can be severe. The civil fines can reach $37,500 per day per violation, and the criminal penalties for "negligent" violations can include fines of $50,000 per day per violation, three years' imprisonment, or both. As the "operators" of construction sites, both property owners and their construction contractors risk such fines and penalties for any failure to obtain a necessary permit. Courts have found both the owner and the constructor of a project to be responsible for compliance, at least where the contractor has control over the discharge activity, and whether or not the contractor reasonably relied on the owner to obtain a necessary permit.

AGC is committed to protecting and restoring the nation's water resources, but it does not believe that it is in the nation's best interest to expand the Clean Water Act beyond its original scope.

III. AGC Opposes the Clean Water Restoration Act

AGC strongly opposes the "Clean Water Restoration Act" (CWRA), which would delete the term "navigable" from the CWA and replace it with a new legislative definition of "waters of the United States" that includes all "intrastate waters" and all "activities affecting these waters." AGC believes that CWRA neither "restores" the original intent of the CWA nor "clarifies" CWA jurisdiction; rather, CWRA would create the greatest expansion of the CWA since it was signed into law in 1972.

CWRA would grant the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) *for the first time ever* jurisdiction over all "intrastate waters"—essentially all wet areas within a state, including groundwater, ditches, pipes, streets, municipal storm drains, gutters, and desert features, as well as authority over all "activities affecting these waters" (public or private, including construction), regardless of whether the activity is occurring in water or whether the activity actually adds a pollutant to the water.

CWRA changes the original intent of Congress in enacting the CWA from the Commerce Clause to the full "legislative power of Congress under the Constitution" and conflicts with CWA Sections 101(b) and 101(g), which state Congressional intent to "recognize, preserve, and protect the primary responsibilities and rights of the States" to control the development and use of local land and water resources and to "allocate quantities of water within [state] jurisdiction."

The practical impacts of CWRA are many and significant. The Corps and EPA would have unlimited regulatory authority over all intrastate waters, including, for example, waters now considered entirely under state jurisdiction, such as isolated wetlands and groundwater. Such a broad expansion would require enormous resources not provided by the legislation, exacerbate an existing funding gap in the CWA regulatory program, and lead to longer permitting delays. In short, CWRA's grab of state and local authority over water and land use would increase the cost of and delay or stop construction projects nationwide and slow economic growth.

In fact, a study of the CWA Section 404 permitting process found that obtaining a nationwide general permit took on average 313 days at a cost of $28,915. Moreover, obtaining an individual permit took on average 788 days at a cost of $271,000. *See* David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetlands Permitting Process*, 42 Nat. Resources J. 59 (Winter 2002).

IV. CWRA Could Provide the Federal Government New Authority to Regulate Groundwater

In 1972, Congress enacted the CWA to restore the chemical, physical, and biological integrity of our nation's lakes, streams, and rivers. Based on the CWA's plain language and its legislative history, Congress did not intend to directly regulate groundwater—water underground. CWRA creates sweeping new federal authority which could extend to groundwater and potentially all activities affecting groundwater.

By deleting the term "navigable" from the CWA and replacing it with the term "waters of the United States" defined to include "all…intrastate waters," the ordinary meaning of the word "all" is "every," "as much as possible," or "every member or individual component," the bill, by its plain language,

suggests the inclusion of groundwater. In addition, the term "intrastate waters" includes waters under state jurisdiction, and most states specifically list groundwater in the definition of "waters of the State." Further, CWRA uses the phrase "to the fullest extent that these waters…are subject to the legislative power of the Congress under the Constitution" to describe the extensive authority over "waters of the United States." Congress' constitutional authority to regulate groundwater is beyond dispute, as groundwater is already regulated under the Safe Drinking Water Act and the Resource Conservation and Recovery Act. Courts relying on the plain language of CWRA may likely conclude that "all means all and nothing less" and EPA and the Corps will find they have no choice but to regulate groundwater.

Under this expansion of federal authority, contractors, especially underground contractors, would continually face the threat of legal liability for unforeseen (and unpreventable) encounters with groundwater. As a result, CWRA would put underground contractors in a situation where their due process rights are being violated. Specifically, there would be no feasible way for the federal government to give contractors the sort of notice they would require to comply with the law. As the law is currently written, it is no defense that you could not anticipate groundwater or delineate the pool of groundwater. As such, every trenching operation (potentially including nearly every hole dug in America) would require a CWA Section 404 permit to avoid risk of violation.

V. AGC Opposes S. 787, the Clean Water Restoration Act of 2009

AGC opposes S. 787, the Clean Water Restoration Act of 2009, as reported by the Senate Environment and Public Works Committee on June 18, 2009. This so-called "compromise" version of CWRA would result in the same outcome—fundamentally expanding the scope of federal CWA jurisdiction—by deleting the term "navigable" from the CWA. Simply stated, the bill is expansion, not restoration of CWA jurisdiction.

The definition in S. 787 includes all "intrastate waters" including "intermittent streams" and "tributaries". However, nothing in the law or regulations in place prior to the Supreme Court decision in *SWANCC* covered all interstate waters. The new definition could allow regulators and third-parties to assert jurisdiction over roadside ditches, municipal storm drains used for flood control and other purposes, groundwater, small desert washes that carry water only a few hours a year, and other features on the landscape that may carry water. By overturning *SWANCC* and reinstating the Migratory Bird Rule, S. 787 would establish federal CWA jurisdiction over any waterbody that "could be used" by a migratory bird (i.e., virtually any water), reaching well beyond the isolated waters S. 787 supporters say they are targeting.

In addition, the "Findings" in Section 3 are incorrectly claimed to demonstrate that S. 787 simply reinstates jurisdiction as defined in the regulations that existed before the *SWANCC* and *Rapanos* decisions. S. 787 addresses fundamental topics in CWA protection through legislative findings that would be better addressed instead through clear statutory language. Further, findings cannot overrule plain statutory language. Thus, a finding that groundwater is not included within "waters of the United States" will not negate legislative language that "all" waters are "waters of the United States," nor will a finding retaining the states' authority to allocate their own water preserve the states' authorities over land and water use.

VI. Supreme Court Provides Starting Point for Administrative Rulemaking

AGC seeks to ensure that the construction industry can continue to contribute to the nation's quality of life. In light of the U.S. Supreme Court's decisions in *Rapanos*, and for the reasons outlined below, AGC supports a rulemaking by the Administration to clarify federal limits over waters and wetlands and opposes legislation, such as CWRA, which would overly extend the jurisdictional reach of the CWA.

In the *Rapanos* decision, the Court vacated prior rulings by the U.S. Court of Appeals for the Sixth Circuit that the federal government has jurisdiction over wetlands connected in any way to actually navigable waters. These cases themselves involved wetlands adjacent to a series of drainage ditches, non-navigable creeks and culverts, and wetlands separated from a drainage ditch by a berm. In both cases, the Sixth Circuit held that the wetlands are "waters of the United States" because they are hydrologically connected to navigable waters.

The Supreme Court vacated these decisions—with a majority of the Court agreeing that the Corps had overstepped its bounds—and remanded the cases to the lower court for further inquiry into the facts. Four Justices (Justices Scalia, Thomas, Alito, and Chief Justice Roberts) reasoned that the CWA authorizes federal jurisdiction over "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams [,] … oceans, rivers, [and] lakes,'" and that the statute excludes from federal jurisdiction "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[1] These four Justices also interpreted the CWA to cover "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."[2]

Justice Kennedy concurred in the judgment but for different reasons. He reasoned that the "significant nexus" standard is the operative standard for determining whether a non-navigable water should be regulated under the CWA. In his concurring opinion, he repeatedly emphasized the importance of the relationship to traditional navigable waters, stating that to be a "water of the United States," a non-navigable water must "perform important functions for an aquatic system incorporating navigable water,"[3] or "play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[4]

The remaining four Justices (Justices Stevens, Souter, Ginsburg, and Breyer) expansively interpreted the CWA to grant the Corps and the EPA jurisdiction over waters and wetlands only remotely connected to traditional navigable waters. While some have made much of the dissenting opinion, these four Justices did not concur in the judgment.

Chief Justice Roberts, lamenting this fractured result, pointed to *Grutter v. Bollinger*[5] and *Marks v. United States*[6] as a guide for lower courts in interpreting *Rapanos*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the

[1] Scalia, slip op. at 20-21.
[2] Scalia, slip op. at 23-24.
[3] Kennedy, slip op. at 24.
[4] Kennedy, slip op. at 25.
[5] 539 U.S. 306, 325 (2003).
[6] 430 U.S. 188, 193 (1977).

Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'"[7] AGC believes it clear that it was Justice Kennedy who "concurred in the judgment on the narrowest grounds." AGC believes it equally clear that his opinion identifies important limitations on federal jurisdiction under the CWA and specific principles that the federal government must consider in making any jurisdictional determinations.

a. AGC Deems a 'Case-by-Case' Standard Unworkable

Following *Rapanos*, to establish that non-navigable water (including a non-navigable wetland) is a "water of the United States," AGC believes that the agencies must measure and establish the nature of the non-navigable water's connection to, and relationship with, traditional navigable waters. The agencies have not undertaken such a review in the past, and Chief Justice Robert lamented the "unfortunate" fact that, in the absence of any further guidance, "lower courts and regulated entities will now have to feel their way on a case-by-case basis."[8]

Proceeding on a case-by-case basis is unacceptable to AGC. It would greatly increase the costs associated with processing permits and the days spent waiting for their issuance. As noted by Justice Scalia in the plurality opinion, the regulated community is already spending about $1.7 billion annually to obtain CWA Section 404 discharge permits.[9] (What is more, the study he cites in support of this figure does not appear to include either the costs or time associated with ascertaining whether the property in question is appropriately subject to federal jurisdiction under the CWA.[10]) Given the issues that *Rapanos* has raised, applicants are likely to suffer even longer delays and incur additional costs while trying to determine whether or not their property is subject to federal jurisdiction.

b. AGC Calls for Administrative Proceedings

AGC believes that the *Rapanos* decision seriously conflicts with EPA's and the Corps' current regulations on "waters of the United States"[11] and that the two agencies need to launch an immediate

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[7] *Id*. at 193.
[8] Roberts, slip op. at 2.
[9] Scalia, slip op. at 2.
[10] Sunding & Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 42 Natural Resources J. 59, 74-76, 81 (2002).
[11] The existing CWA regulations define "waters of the United States" as follows:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including such waters:
    (i) which are or could be used by interstate or foreign travelers for recreational or other purposes;
    (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    (iii) which are used or could be used for industrial purposes by industries in interstate commerce;
(4) All impoundment of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States.

effort to update those regulations. We agree with four of the Justices who specifically suggested a clarifying rule.[12] The Court's plurality noted "the immense expansion of federal regulation of land use that has occurred under the CWA—without any change in the governing statute—during the past five Presidential administrations."[13] AGC urges Congress to instruct the Corps and EPA to issue new rules that adhere to the commonalities between Justice Scalia's plurality opinion and Justice Kennedy's concurrence.

AGC believes it is clear that Justice Kennedy's opinion establishes important limitations on the Corps and EPA's authority to regulate work in water and wetlands and identifies certain principles that the Corps must consider in determining whether non-navigable waters have the requisite nexus with traditional navigable waters, as follows—

- The federal government may no longer regulate non-navigable waters or wetlands based solely on their mere hydrological connection to a navigable waterbody.
- The federal government may not rigidly insist that an "ordinary high water mark" is the appropriate measure for identifying jurisdictional tributaries.
- The federal government may no longer consider all "connected" waters to be tributaries and may not automatically assert jurisdiction over any wetland "adjacent" to such connected waters.
- The federal government may no longer regulate "isolated" waters and wetlands.

In *Rapanos*, Justice Kennedy rejected the Corps' practice of asserting jurisdiction over any non-navigable water that has any hydrological connection to any navigable water. Justice Kennedy holds that to be jurisdictional, a non-navigable waterbody's relationship with traditional navigable waters must be "substantial:"

> [M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.[14]

Inappropriately, the government's principle test for jurisdiction has been any hydrological connection to traditional navigable waters. Based on the assumption that water flows downhill, the Corps has asserted jurisdiction over non-navigable waters without even considering how far they lie from navigable water, how frequently they carry water, or how much water they carry.

Now, to establish that a non-navigable water (including a non-navigable wetland) is a "water of the United States," it is apparent that the agencies must measure and establish the nature of the non-navigable water's connection to, and relationship with, traditional navigable waters. To illustrate this point, Justice Kennedy requires, for non-navigable wetlands, a showing that:

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(8) Waters of the United States do not include prior converted cropland...
Different CWA regulations contain slightly different formulations of the definition. For simplicity's sake, these comments refer to the Corps' version at 33 CFR § 328.3(a). Other versions appear at, e.g., 40 CFR §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3(s), and 232.2.

[12] *Rapanos v. United States*, 547 U.S. ___, slip op. at 25 (Kennedy, J. concurring); *Id.*, slip op. at 2 (Roberts, C.J. concurring); *Id.*, slip op. at 14 (Stevens, J. dissenting; and *Id.*, slip op. at 2 (Breyer, J. dissenting).

[13] Scalia, slip op. at 3.

[14] Kennedy, slip op. at 28.

> [T]he wetlands, either alone, or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term, 'navigable waters.'[15]

Justice Kennedy also rejects the Corps' current approach to identifying "tributaries." Specifically, Justice Kennedy calls into question the Corps' use of "ordinary high water mark" (OHWM) as a measure for identifying tributaries. He starts by noting that the "Corps views tributaries as within its jurisdiction if they carry a perceptible 'ordinary high water mark.'[16] Ultimately, he concludes that the current regulations, as applied by Corps, stray too far from traditional navigable waters:

> [T]he breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carry only minor water-volumes towards it—precludes its adoption as a determinative measure … Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.[17]

Justice Scalia was likewise unpersuaded by the Corps' treatment of "tributaries" and use of OHWM.[18] Inappropriately, the Corps has been using the presence of an OHWM (which it defines in terms of physical characteristics, not ordinary flow) to claim federal jurisdiction over many ditches, dry desert drainages, swales, and gullies.

In addition, Justice Kennedy rejects the government's notion that the Corps may regulate all wetlands that are adjacent to all tributaries. Justice Kennedy's rejection of the Corps' tributary standard leads him also to reject the Corps' practice of regulating all wetlands that are adjacent to all tributaries. He finds that "[a]bsent more specific regulations, … the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[19] Justice Kennedy adds that the Corps "[t]hrough regulations or adjudication may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely…" to have a significant nexus to navigable waters.[20] He repeatedly cautions that "insubstantial," "speculative," or "minor flows" are insufficient to establish a "significant nexus."[21]

Inappropriately, the Corps' current definition of "adjacent" purports to allow the federal government to control all wetlands that are "bordering, neighboring, or contiguous" to any of the waters covered in

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[15] Kennedy, slip op. at 23.
[16] 33 CFR 328.4(c); 65 Fed. Reg. 12,823 (2000).
[17] Kennedy, slip op. at 24-25.
[18] Scalia, slip op. at 6-9.
[19] Kennedy, slip op. at 25.
[20] Kennedy, slip op. at 24.
21 Kennedy, slip op. at 22-24.

the regulation at Section 328.3(a)(1)-(7) (the seven categories of waters of the United States), including all tributaries, however defined.

Finally, Justice Kennedy confirms that nonnavigable, isolated, intrastate waters are not jurisdictional.[22] This was the opinion of the Court in its 2001 decision in *SWANCC*.[23] Some interests have disputed this interpretation, claiming that such waters are beyond the scope of the CWA only where the only basis for asserting federal CWA jurisdiction is the use of such waters by migratory birds. But the Court in *Rapanos* clarified its previous decision. Under the plurality opinion in *Rapanos*, all isolated water and wetlands are clearly outside the authority of the federal agencies under the CWA. Justice Kennedy in his concurring opinion cites *SWANCC's* "holding" that "nonnavigable, isolated, intrastate waters" are not "navigable waters . . . ."[24]

Following *SWANCC*, the Corps has continued to inappropriately regulate any water/wetland that is not isolated by claiming that all connected waters are tributaries.

In sum, Justice Kennedy's analysis in *Rapanos* calls into question the Corps' current regulations at 33 CFR Section 328.3(a)(5) (tributaries) and (a)(7) (adjacent wetlands). The definitions of "adjacent" at Section 328.3(c) and "ordinary high water mark" at 33 CFR Section 328.3(e) are similarly suspect. Further, Justice Kennedy is writing against the backdrop of *SWANCC*, in which the Supreme Court had previously rejected the "other waters" regulation at 33 CFR Section 328.3(a)(3).

VII. Corps/EPA Joint Guidance Not Enough

In 2008, the Corps and EPA jointly issued guidance on the extent of federal control over water and wetlands. The new interagency guidance, commonly called the "2008 *Rapanos* guidance," explains how regulators plan to exercise control over construction activities impacting wetlands, tributaries, and other waters, based on the Supreme Court's decision. The 2008 *Rapanos* guidance is intended to ensure that jurisdictional determinations and other relevant agency actions being conducted under the Section 404 program are consistent with the *Rapanos* decision. AGC joined with organizations representing the housing, mining, agriculture, and energy sectors to submit detailed comments on the 2007 draft version.

The 2008 *Rapanos* guidance generally builds upon the 2007 version, without substantial modifications. The revised 2008 guidance makes only three (3) noteworthy changes to the 2007 version (despite the fact that the agencies received 66,047 public comments on the draft). First, wetlands and waterways are subject to the CWA regime only if they have a relationship, or, in Judge Kennedy's words, a "significant nexus," to what the agencies call "traditional navigable waters" or TNW. The revised guidance clarifies that TNWs are broader than Rivers and Harbors Act Section 10 waters (33 U.S.C. 403), and also include (1) waters deemed to be navigable-in-fact by the courts, (2) waters currently being used for – or that have historically been used for – commercial navigation or recreation, (3) waters that are "susceptible to being used in the future for commercial navigation… [or] recreation"

[22] Current regulations define "isolated waters" as those non-tidal waters of the United States that are (1) not part of a surface tributary system to interstate or navigable waters; and (2) not adjacent to such tributary waterbodies. 33 CFR § 330.2(e)(2005).
[23] *Solid Waste Agency of Northern Cook County(SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
[24] Kennedy, slip. op. at 17.

when evidence of such use is more than "insubstantial or speculative." See 2008 *Rapanos* guidance page 5, footnote 20. AGC's comments on the 2007 guidance urged EPA and the Corps to better explain the concept of TNW. However, the agencies ultimately took a very expansive view of TNW (finding that commercial recreation is good enough), and the 2008 guidance directly conflicts with AGC's position that TNWs should be limited to the Rivers and Harbors Act waters.

Second, the revised guidance attempts to clarify what the Supreme Court meant when it required wetlands and waterways to be "adjacent" to federally-controlled waters to receive their own federal protection. Adjacent is defined in the Corps regulations at 33 C.F.R. § 328.3(c) and means "neighboring, bordering, or contiguous." The 2008 guidance interprets this to mean that wetlands are adjacent to traditionally navigable waters when there is a hydrologic connection, even if the connection is intermittent (a continuous surface connection is not required!); when the wetlands are separated from jurisdictional waters by formations such as man-made dikes or natural river berms; or when the wetlands' proximity to jurisdictional waters is reasonably close, based on an ecological interconnection. AGC is concerned that this new language will, in effect, unlawfully expand the regulatory definition of adjacent as it is applied in the field.

And finally, the 2008 guidance attempts to clarify the term "tributary flow," another issue the Supreme Court introduced in the *Rapanos* decision. The revised guidance modifies the process for assessing flow in tributaries (for purposes of determining whether a tributary is relatively permanent), indicating that where the downstream limit is not representative of the stream reach as a whole, "the flow regime that best characterizes the entire tributary" should be used. The 2007 version of the interagency guidance stated that the flow characteristics of a particular stream reach should be evaluated at the farthest downstream limit of the reach (i.e., the point the tributary enters a higher order stream). AGC commented that assessing flow at the downstream point is not the most appropriate approach to characterizing the entire stream.

The 2008 guidance is consistent with the 2007 version in specifying that a "significant nexus" analysis will assess the flow characteristics and functions of the tributaries and the functions of the wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters. A significant nexus determination includes consideration of hydrologic and ecologic factors. AGC argued that there needs to be actual data showing impacts to integrity of traditional navigable waters to establish a significant nexus, but the agencies chose not to modify the earlier guidance.

In addition, the 2008 guidance maintains the interagency procedure for reviewing and approving significant nexus-related jurisdictional determinations (JDs). A memorandum dated January 28, 2008, provides for a shorter, more efficient coordination process (than what was established by the 2007 *Rapanos* guidance) wherein the Corps districts act without EPA oversight. Specifically, when the Corps asserts CWA jurisdiction following a significant nexus finding, it notifies the appropriate EPA regional office. The EPA region then has 15 days to decide whether to make the final jurisdictional determination as a "special case," using a separate process in place since 1989. If EPA does not respond, the Corps will finalize the JD. AGC had expressed concern that the interagency coordination process outlined in the 2007 guidance was causing delays and recommended that coordination with EPA be ended altogether.

In its comments on the 2007 version of the interagency guidance, AGC expressed concern regarding delays in finalizing official JDs (i.e., "approved JDs") and implications of those delays for permitting decisions and timing of associated construction projects. AGC pointed out the processing delays caused by data-intensive approved jurisdictional determinations called for by Regulatory Guidance Letter (RGL) 07-01, which was issued as part of the 2007 *Rapanos* guidance. (RGL 07-01 required all CWA Section 404 applicants to obtain an "approved JD" for each water body impacted by a project, regardless of whether jurisdiction was contested.) In response, the Corps issued RGL 08-02, clarifying that project proponents may request a preliminary JD based on an "effective presumption of jurisdiction over all of the wetlands and other water bodies at the site," essentially allowing a project proponent to concede jurisdiction. RGL 08-02 is currently in effect and replaces RGL 07-01.

VIII. McWane Case

On December 1, 2008, the United States Supreme Court denied certiorari in an Eleventh Circuit case, *McWane Inc. v. United States,* 505 F.3d 1208 (11th Cir. 2007), the grant of which would have presented the Court an opportunity to reconsider jurisdictional determinations of "waters of the United States" under the Clean Water Act. AGC submitted a brief in support of the government's petition for writ of certiorari, asking the Supreme Court to clarify its decision on federal regulation of wetlands in *McWane*, and arguing that "the Corps and EPA need clear and administrable rules defining the scope of the CWA's coverage." The Supreme Court denied certiorari without comment. Notably, in the 2008 *Rapanos* guidance, the agencies continue to maintain their position that regulatory jurisdiction exists over a water body under the Clean Water Act, if either the plurality test or the Kennedy "significant nexus" test is met. The agencies recognize, however, that in the 11th Circuit (jurisdiction over federal cases originating in the states of Alabama, Florida and Georgia), the Kennedy standard is the controlling test and the sole method of determining CWA jurisdiction in that Circuit.

IX. Conclusion

AGC strongly opposes CWRA or similar legislation that would significantly expand federal jurisdiction under the CWA and pre-empt the administrative rulemaking the Supreme Court recommended and provided important direction for in *Rapanos*. The Administration has taken a first and necessary step by issuing joint Corps/EPA guidance. Rather than obstruct this effort, Congress should encourage and oversee a subsequent rulemaking to provide further and long overdue clarity to CWA jurisdictional issues involving waters and wetlands. Doing so will allow the regulated community to continue to deliver critical infrastructure projects in a timely and cost-effective manner, while protecting and enhancing the environment.

Thank you.